Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92M-668
03128

In re Applications of	)	MM DOCKET NO. 92-61
	)	
LRB BROADCASTING	)	File No. BPH-901218MI
	)	
DAVID WOLFE	)	File No. BPH-901219MI
	)	
ZENITRAM COMMUNICATIONS, INC.	)	File No. BPH-901220MG
	)	
For Construction Permit for a New FM Station on Channel 288A in Brockport, New York	)	

MEMORANDUM OPINION AND ORDER

Issued: June 11, 1992; Released: June 12, 1992

Background

1. This is a ruling on Joint Motion To Dismiss For Failure To Prosecute filed on May 18, 1992, by David Wolfe ("Wolfe") and LRB Broadcasting ("LRB") (collectively referred to as "Movants"). An Opposition To Joint Motion To Dismiss Application was filed on June 1, 1992, by Zenitram Communications, Inc. ("Zenitram"). A Reply was filed by Movants on June 10, 1992. Also considered are Supplement To Joint Motion To Dismiss For Failure To Prosecute filed by Movants on May 22, 1992, Report filed by Zenitram on May 22, 1992, Supplement To Opposition To Joint Motion To Dismiss Application filed by Zenitram on June 1, 1992, and Second Supplement To Opposition To Joint Motion To Dismiss Application filed by Zenitram on June 4, 1992.

Facts

2. This case was initiated by the Bureau under Hearing Designation Order ["HDO"] (DA 92-360), released April 13, 1992, reported at 7 F.C.C. Rcd 2291 (MM Bur. 1992) and published at 57 F.R. 13355 (April 16, 1992). The HDO specifically notifies the parties that they must file Notices of Appearance within 20 days of the mailing of the HDO and that a Standard Document Production and a Standard Integration Statement must be exchanged five days thereafter. HDO at Para. 15. The HDO further gives notice that:

> Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application.

HDO at Para. 15.

3. On April 16, 1992, the Presiding Judge issued his Prehearing Conference Order, FCC 92M-473, released April 17, 1992. The parties were put on specific notice that this case was being held under the new procedures set by the Commission in the Proposals To Reform The Commission's Comparative

Hearing Processes To Expedite The Resolution Of Cases (Gen. Doc. 90-264), 6 F.C.C. Rcd 157 (1990) and 6 F.C.C. Rcd 3403 (1991). Id. at Para. 1.

4. The parties were specifically expected to have "timely filed their Notices of Appearance ("NOA") under 47 C.F.R. §1.221." And parties who did file timely NOAs were required:

> - - - within five days of filing and service of their NOAs, effect the Standard Document Production ("SDP") under 47 C.F.R. §1.325(c)(1), and shall exchange Standard Integration Statements ("SIS") under 47 C.F.R. §1.325(c)(2).

Id. at Para. 4. (Emphasis in original.) The parties were also reminded of the following:

> The parties are on notice that failures to comply with procedural and discovery orders of the presiding trial judge may result in dismissal.

Id. at n. 6.

5. The HDO required that SDP materials be produced by May 11, 1992, five days after the NOAs were filed. Wolfe and LRB aver that they served their document production materials on that date. It further appears that Wolfe and LRB filed timely their NOAs. Zenitram, on the other hand, did not file an NOA until May 18, 1992, and Zenitram did not exchange the required documents until June 2, 1992. [1] Zenitram had neither received nor requested an extension of time from the Presiding Judge.

6. Zenitram's NOA was dated May 4, 1992, the date on which it was due to be filed. But it was not filed until May 18, 1992. The Report filed by Zenitram on May 22, 1992, states in that regard as follows:

> On Saturday, May 16, 1992, counsel for Zenitram received a document entitled "Non Delivery Notice" (the "notice") from the courier which (sic) services had been retained for timely delivery of a package to the office of the Secretary of the Commission on May 4, 1992. The package contained, inter alia, Zenitram's post Hearing Designation Order "Notice of Appearance. The notice showed that the package was being held at the Washington National Airport near Washington, D.C.

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1 Zenitram also filed late its Standard Integration Statement which has been rejected for consideration. See Memorandum Opinion and Order, FCC 92M-654, released June 10, 1992. Therefore, even if Zenitram were not dismissed for failure to prosecute it would be foreclosed from making any comparative showing.

The Report continues to offer the following explanation through Zenitram's counsel. Counsel concludes that "inexplicably - - -, the package [had] been held for two (2) weeks at the airport." There is no affidavit offered by Zenitram from the allegedly delinquent courier. Nor is there a description of the "inter alia" materials that were contained in the envelope that allegedly was left at the National Airport. There was not even submitted a copy of a bill of lading or receipt from the courier acknowledging custody.

7. In its Report, counsel for Zenitram asserts that Zenitram's NOA was served upon the Presiding Judge, other counsel, and the Bureau's Hearing Branch and Data Management Branch. But there is no date mentioned as to when such service occurred. Nor is there any description of the manner in which such services were made. The work files of the Presiding Judge contain courtesy copies of NOAs that were furnished by LRB and Wolfe on May 4, 1992. But the Presiding Judge had not received a copy of Zenitram's NOA by that date.

8. In its Opposition that was filed on June 1, 1992, [2] Zenitram relies on the account in its Report as justification for missing the filing deadline for its NOA. There is no mention made with respect to Zenitram's failure to deliver its SDP materials. Zenitram further states in its Opposition:

> On July 15, 1991, Zenitram paid its hearing fee and filed a Notice of Appearance. A copy of that pleading is attached as Exhibit 1 hereto.

There was no Exhibit 1 document to the copy of Zenitram's Opposition that was forwarded to the Presiding Judge by the Secretary's office. [3] An unauthorized pleading styled "Second Supplement To Opposition To Joint Motion To Dismiss Application" was filed by Zenitram on June 4, 1992. It contained attachments of a letter from counsel to the Mellon Bank lockbox dated July 12, 1991, a copy of a "Notice of Appearance And Payment Of Hearing Fee "dated July 12, 1992, and a copy of an FCC Fee Processing Form reflecting remittance of $6,760. But no cancelled check was provided. A review of the Commission's List of Broadcast Applicants Submitting Hearing Fee Payments Under New Rules (Public Notice 14040), July 19, 1991, failed to reflect a payment of a hearing fee by Zenitram between July 8, 1991 and July 16, 1991.

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2 The Commission's rules provide that oppositions to motions to dismiss must be filed within ten (10) days after the motion is filed. Allowing three days for service by mail, Zenitram's Opposition was timely filed. 47 C.F.R. §1.294(c)(3). There is a five day period allowed for a Reply pleading. Id.

3 The copy of the Opposition considered by the Presiding Judge reflected the stamp of the Commission Secretary. The pleading did not have any exhibit attached.

Discussion

9. This is a three party comparative proceeding for a new FM facility in Brockport, New York. Two of the applicant parties, LRB and Wolfe, have thus far met the filing and discovery requirements of the new hearing procedures. Also, both LRB and Wolfe are in compliance with the Presiding Judge's Prehearing Conference Order, supra. Thus, there is no public interest to retain Zenitram as a party applicant if it has failed to follow the Commission's rules, the Bureau's designation order, and the Presiding Judge's procedural order. Cf. Capitol City Broadcasting Company, 7 F.C.C. Rcd 2629, (Comm'n 1992) (Comm'n no longer favors curing disqualifying defects in applicants' proposals). The same policy would apply to disqualifying conduct in a party's failing to prosecute an application in a multi-party comparative case under the new expedited procedures. [4] In this case, Zenitram has failed to file a Notice of Appearance and to exchange required documents on time and has not offered a credible excuse. See CSJ Investments, Inc., 5 F.C.C. Rcd ____ , Comm'n Slip Op. FCC 90-367 (November 16, 1990) (applicant dismissed for failure to show good cause for failing to file NOA and fee where failures of mail was alleged as excuse). It cannot be found with reasonable certainty that Zenitram had earlier filed an NOA and paid its fee because the copies provided do not reflect received stamps at the FCC, there is no copy of a cancelled check provided, and the Public Notice for the relevant period fails to account for Zenitram. In any event, the new procedures require an NOA after the case is set for hearing and Zenitram was required to follow the rules. It was particularly important to file timely the post-designation NOA because it started the time for exchange of documents and the SIS.

10. The duty to file on time is the applicant's and it cannot be delegated to a courier service. If it is factually accurate that Zenitram had hired a negligent courier service, then Zenitram suffers the consequences. Cf. Hillebrand Broadcasting, Inc., 1 F.C.C. RCD 419, 420 n. 6 (Comm'n 1986) (application dismissed where failures were those of agent - attorney because a party will be bound by its agent's action and omissions). The lack of an affidavit from an allegedly errant courier raises a presumption against Zenitram that there was a negligent courier at fault, if ever there was a courier. Zenitram has the burden of persuasion which equates to showing good cause, a burden which could only be met by producing a written statement from the person or entity that was the bailee of the document that had failed to be delivered to the Commission. Cf. Silver Springs Communications, 3 F.C.C. Rcd 5049 (Review Bd 1988), rev. den., 4 F.C.C. Rcd 4917 (1989) (good cause not shown where applicant merely asserted it had not received delivery of the HDO

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4 It was noted above that Zenitram had not requested an extension of time to file late its NOA. Based on the facts presented, such a request may not have been granted under the Commission's policy. See Public Notice No. 23247, Requests For Extension Of Time In Adjudicatory Cases Will Not Be Routinely Granted (May 22, 1992).

and therefore had defaulted on NOA and filing fee). [5] In fact, the courier service is not even identified and no copy of an invoice or bill of lading was submitted so it is impossible for opposing counsel to check out the assertions of Mr. Emert.

11. The Commission requires that an analysis be made under the leading court case on standards for dismissal by default. See Nancy Naleszkiewicz, 7 F.C.C. Rcd 1797, 1800 (Comm'n 1992) at Para 22. The court held in Communi-Centre Broadcasting, Inc. v. F.C.C., 856 F.2d 1551, 1554 (D.C. Cir. 1988):

> [W]hether there is just cause for dismissal for failure to prosecute [depends on] the applicant's proferred justification for the failure to comply - - -, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter further misconduct.

In Communi-Centre the delinquent filing was twelve days late. Here, Zenitram's document production was twenty two days late.

12. As noted above, in the Silver Spring case it was held that there can be no resolution of issues relating to delivery of pleadings to the Commission by mere assertion of non-delivery because resolution of possible defaults on such flimsy evidence would result in "confusion, havoc and abuse." See n. 5 above. That would be the result here if Zenitram's assertions about a negligent courier were accepted without a higher quality of proof. In addition, there is now an added policy and practice to consider as a result of the adoption of the new reform procedures. Now it is required that five days after filing an NOA, parties must exchange documents which consist of twelve comprehensively identified classifications under the rules. See 47 C.F.R. §1.325(c)(1). That document exchange facilitates a prompt start on framing issues and preparing for deposition discovery. Zenitram was late by a factor of twenty two days. In addition, on the same fifth day after filing the NOAs, each comparative party must file and serve a Standard Integration Statement. 47 C.F.R. §1.325(c)(2). That document is essential for determining at an early stage of the litigation how the parties are comparatively aligned which enables parties to assess settlement and to use it to prepare for discovery on such issues as the probability of the ability to carry out an integration proposal. Without the documents and the integration statement, the discovery efforts of LRB and Wolfe are stalled. Thus, Zenitram's failure to file its

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5 The Review Board held, as had the trial judge:

> If the Commission begins entertaining and accepting arguments that letters mailed in Commission proceedings were not delivered, procedural confusion, havoc and abuse would result.

Id. at Para. 4. That was a holding even before the adoption of the Commission's new expedited procedures that apply in this case.

NOA and related discovery documents on the prescribed dates without showing good cause with reliable evidence for failing to meet those dates, would warrant summary dismissal so that the case can move forward on schedule.

13. The prejudice suffered by other parties is their inability to timely discover Zenitram's documents and integration plan which are needed to prepare for further discovery and trial. The initial document disclosure must be made and assessed before LRB and Wolfe can determine whether to make a supplemental documentary request. 47 C.F.R. §1.325(c)(3). There is also a right to seek to compel production where the initial disclosures are believed to be incomplete, a process which requires a round of pleadings. The parties will be held to the Commission's prescribed deadlines for hearing this case on September 1, 1992. Therefore, the competing applicants LRB and Wolfe suffer substantial prejudice from Zenitram's defaults because those defaults lessen the time for completing discovery and preparing for trial.

14. The burden on the administrative system caused by Zenitram's default also is substantial. The Presiding Judge is uncertain as to when discovery can be completed while affording due process to LRB and Wolfe to prepare for discovery and trial. That uncertainty places the prescribed hearing date in jeopardy. In addition, there are the resulting rounds of pleadings on motion to dismiss that must be considered by the Presiding Judge in making this ruling. All of the time delays and the attendant uncertainties created by the defaults may operate to extend the time for the Presiding Judge's initial decision beyond the nine months from designation intended by the Commission. 6 F.C.C. Rcd 162, at Para. 39. If Zenitram's tactics are successful, certain future applicants could be motivated to use similar tactics to delay the implementing of the early discovery procedures that the Commission has prescribed.

Ruling

Accordingly, IT IS ORDERED for the failure of Zenitram Communications, Inc. to show good cause for accepting its late filed Notice Of Appearance and related discovery, that the Joint Motion To Dismiss For Failure To Prosecute filed on May 18, 1992, by LRB Broadcasting and David L. Wolfe IS GRANTED.

IT IS FURTHER ORDERED that the application of Zenitram Communications, Inc. (File No. BPH-901220MG) IS DISMISSED with prejudice for its failure to prosecute.

IT IS FURTHER ORDERED that the name Zenitram Communications, Inc, SHALL BE STRICKEN from the case caption.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge